

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of:

XM Satellite Radio Holdings, Inc.,
Transferor

and

Sirius Satellite Radio Inc.,
Transferee

Consolidated Application for Authority to
Transfer Control of XM Radio Inc. and
Sirius Satellite Radio Inc.

)
)
) File Nos.:
) SAT-T/C-20070320-00054;
) SAT-T/C-20070320-0053;
) SES-T/C-20070320-00380;
) SES-T/C-20070320-00379;
) 0002948781;
) 004-EX-TC-2007
)
) MB Docket No. 07-57
)
)
)

To: The Secretary

COMMENTS OF ENTRAVISION HOLDINGS, LLC

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SUMMARY

Entravision Holdings, LLC submits these Comments to express its opposition to the Consolidated Application filed by Sirius Satellite Radio Inc. and XM Satellite Radio Holdings, Inc. in which the Applicants seek Commission consent to the merger of the two existing licensed satellite digital audio radio service providers into a monopoly firm. The Commission has never before granted a merger to monopoly within a single spectrum-licensed service. Applicants fail to satisfy the rigorous public interest showing required for such a merger.

The evidence on the record in this proceeding indicates that terrestrial radio and other alternative audio services are complements to, rather than substitutes for, satellite radio. This evidence demonstrates that SDARS comprises a distinct product market. If Sirius and XM are permitted to form a SDARS monopoly, the combined entity will engage in anti-competitive conduct with negative consequences for consumers and terrestrial radio alike.

The purported benefits of the proposed transaction are non-merger-specific, non-cognizable and speculative. Further, the merger benefits touted by Sirius and XM fail to counterbalance the serious competitive harms that would arise in connection with a SDARS monopoly. Finally, price regulation is an inadequate and undesirable remedy for these competitive harms. Competition, not monopoly, is the best means of ensuring that satellite radio service provides optimal benefits and minimal costs to consumers. For these reasons, the Consolidated Application is contrary to the public interest and should be denied.

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and)	SES-T/C-20070320-00380;
)	SES-T/C-20070320-00379;
Sirius Satellite Radio Inc.,)	0002948781;
<i>Transferee</i>)	004-EX-TC-2007
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To: The Secretary

COMMENTS OF ENTRAVISION HOLDINGS, LLC

Entravision Holdings, LLC ("Entravision"), the licensee of broadcast radio stations providing Spanish-language programming primarily to Hispanic audiences, by its attorneys, hereby submits these Comments in the above-captioned transfer of control proceeding ("Consolidated Application") in which the Commission seeks comment on the proposed merger between Sirius Satellite Radio Inc. ("Sirius") and XM Satellite Radio Holdings Inc. ("XM") (collectively, the "Applicants"), the sole existing licensed providers of satellite digital audio radio service ("SDARS") in the United States. The transaction proposed by Sirius and XM constitutes an unprecedented merger to monopoly that would harm consumers as well as the broadcast radio industry and entangle the Federal Communications Commission and other federal authorities in unworkable and undesirable regulation of the SDARS industry. The proposed merger is contrary to the public interest and should be denied. In support thereof, Entravision states as follows.

INTRODUCTION

The SDARS industry currently is comprised of just two competitors, Sirius and XM. The transaction proposed in the Consolidated Application would combine these competitors into a single entity, thereby replacing competition with monopoly as the engine of the SDARS industry. Such a merger to monopoly within a single spectrum-licensed service is unprecedented and runs counter to the pro-competitive underpinnings of contemporary Commission policies¹ and antitrust law. To secure approval for such a merger, Sirius and XM would have to demonstrate that unprecedented conditions require the Commission and the Department of Justice ("DOJ") to redefine the public interest and to abandon traditional yardsticks used in antitrust analysis. The Applicants fail to provide such a showing.

Instead, Sirius and XM seek to avoid close scrutiny of the potential harms of their proposed merger by expanding the market definition applicable to SDARS. That is, the Applicants attempt to disguise the elephant in the room by knocking down the walls. However, consumers, regulators and audio service providers themselves regard terrestrial radio and other audio services as complements to, not direct substitutes for satellite radio. Thus, while SDARS providers may experience some competition from complementary audio services, SDARS clearly comprises a non-substitutable service and a distinct product market. The reasonable observer can readily see that the elephant is still an elephant.

Sirius and XM also offer a number of benefits that purportedly will flow from the merger, benefits they claim will outweigh any competitive harms that could arise in connection with the

¹ See, e.g., the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104, 110 Stat. 56 (1996) ("An Act [to] promote competition and reduce regulation").

SDARS monopoly the so vigorously seek. However, the benefits touted by Sirius and XM are not merger-specific – Sirius and XM could each individually achieve the benefits they seek to ascribe exclusively to the proposed merged firm. Moreover, these alleged benefits do not outweigh the competitive costs that would arise in connection with a SDARS monopoly. Finally, the parties have indicated their willingness to accept a period of price regulation as a condition of permitting the merger to go forward. It would be unwise to take the Applicants' promises seriously. In their tenure as Commission licensees, Sirius and XM have routinely demonstrated their willingness to flout terms and conditions imposed upon them by the Commission. Beyond the Applicants' inability to keep promises, price controls are inherently at odds with the pro-competitive policies informing the Commission's contemporary regulation of communications services and the pro-competitive underpinnings of antitrust law. Entravision submits that continued competition in the SDARS industry will better serve the public interest than micro-regulation of an uncooperative monopolist by reluctant regulators. For these reasons, the proposed merger of Sirius and XM should be denied.

The competitive harms and purported benefits of the merger as well as the efficacy of a price control remedy are discussed, in turn, below.

I. STANDARD OF REVIEW

Pursuant to Section 310(d) of the Communications Act of 1934 (the "Act"),² the Commission evaluates proposed transfers of control of Commission licenses and authorizations under its "public interest" standard.³ In recent cases, the Commission has applied this standard

² 47 C.F.R. § 310(d).

³ DOJ evaluates proposed mergers pursuant to its own Merger Guidelines as well as federal court decisions interpreting Section 7 of the Clayton Act. *See* U.S. Department of Justice/FTC Joint Horizontal Merger Guidelines (April 2, 1992, revised April 8, 1997) ("Merger

by considering "potential competitive harms and benefits to determine whether the proposed transaction would promote the public interest."⁴ In analyzing potential harms, the Commission examines the possible anticompetitive effects of the proposed transaction and the extent to which the proposed transaction may violate the Act or frustrate the Commission's policies.⁵ According to the Commission:

In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules. If the proposed transaction would not violate a statute or rule, the Commission considers whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes. The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against the potential public interest benefits.⁶

Applicants bear the burden of proof, by a preponderance of the evidence.⁷

With respect to the Commission's initial inquiry, whether the proposed transaction violates a statute or rule, Entravision notes that the Commission has commenced a separate rulemaking to address the issue of whether the ban on the two existing SDARS providers combining to form a single firm (set forth in the Order creating SDARS)⁸ constitutes a binding

Guidelines"); 15 U.S.C. § 18 (prohibiting transaction the effect of which "may be substantially to lessen competition, or to tend to create a monopoly").

⁴ *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 20008-9 (1997).

⁵ *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816 (2000).

⁶ *SBC Communications Inc. and AT&T Corp. Applications for Transfer of Control*, 20 FCC Rcd 18290, 18300 (2005) ("*SBC/AT&T Merger Order*").

⁷ *See id.*

⁸ *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5823, ¶ 170 (1997) ("*SDARS Order*"). The prohibition reads as follows:

rule.⁹ Entravision will reserve its comments concerning the SDARS rule for the *Merger Ban NPRM* proceeding, and merely states here its position that the prohibition constitutes a binding rule, and that waiver, modification or repeal of the rule would be contrary to the public interest and must be dismissed or denied.

II. ANALYSIS OF COMPETITIVE HARMS

Applicants' proposal to merge into a single firm would put an end to the disciplining effect of competition in the SDARS market and lead to higher prices for consumers, poorer quality products and less innovation across the industry. In short, the proposed transfer constitutes a merger to monopoly, triggering countless red flags under both the Commission's public interest analysis and DOJ's antitrust analysis. However, Sirius and XM have vied for wiggle room under Commission precedent and antitrust principles by alleging a broad market definition that includes not only SDARS, but terrestrial radio, HD radio, Internet radio, iPods and MP3 players, mobile phones and CD players.¹⁰ Neither the Commission's rationale for creating a competitive satellite radio service, developed barely a decade ago,¹¹ nor the Commission's order rejecting an analogous transfer application submitted by direct broadcast satellite ("DBS")

We note that DARS licensees, like other satellite licensees, will be subject to rule 25.118, which prohibits transfers or assignment of licenses except upon application to the Commission and upon a finding by the Commission that the public interest would be served thereby. Even after DARS licenses are granted, one licensee will not be permitted to acquire control of the other remaining satellited DARS license. This prohibition on transfer of control will help assure sufficient continuing competition in the provision of satellite services.

Id.

⁹ *Applications for Consent to Transfer of Licenses from XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee*, Notice of Proposed Rulemaking, FCC 07-119, released June 27, 2007 ("*Merger Ban NPRM*").

¹⁰ See Consolidated Application at 20-39.

¹¹ See *SDARS Order*, *supra*.

providers EchoStar and DirecTV, decided only a few years ago,¹² support such a broad market definition for satellite radio. With the weight of such recent decisions against them, Applicants would have to prove, by a preponderance of the evidence, that market conditions have significantly and permanently changed, such that the alternative audio services listed above not only compete with, but can also serve as substitutes for, satellite radio.¹³ In other words, Sirius and XM must demonstrate that their merger is not anti-competitive, because the threat of competition from other audio services would effectively constrain the anti-competitive behavior of a single SDARS licensee. This the Applicants have not done.

A. The Relevant Market Definition

The Commission's market analyses in both the *SDARS Order* and the *DBS Order*, together with the fact that alternative audio services remain complements to, rather than substitutes for SDARS, indicate that SDARS constitutes its own product market.

1. SDARS' Origins and the DBS Merger Proceeding

Since the inception of SDARS in 1997, the Commission has treated satellite radio as a product market separate and distinct from terrestrial radio, playback devices (such as CD players) and other audio services:

Other audio delivery media are not ... perfect substitutes for satellite DARS. These media and satellite DARS all differ with respect to the programming menu (terrestrial radio can provide local programming and satellite DARS cannot), the sound quality, cost of equipment, and the presence or absence of a subscription fee ... The availability of these media, terrestrial radio in particular, varies across

¹² See *Application of EchoStar Communications Corp., et al.*, 17 FCC Rcd 20559 (2002) ("*DBS Order*").

¹³ Pursuant to its Merger Guidelines, DOJ considers product *x* to be a viable substitute for product *y* if consumers would substitute *x* for *y* in the event the price of *y* increased by a "small but significant and nontransitory" amount, e.g., 5 to 10 percent. Merger Guidelines at ¶¶ 1.11-1.12.

populated areas.¹⁴

The absence of sufficient substitutability between SDARS and other audio media informed the Commission's decision to establish SDARS as a competitive service. According to the Commission:

Licensing at least two service providers will help ensure that subscription rates are competitive as well as provide for a diversity of programming voices. The two DARS licensees will compete against each other for satellite DARS customers and will face additional competitive pressures from the other aural delivery media...¹⁵

The Commission reaffirmed its view of SDARS as a distinct product market as recently as March 2007.¹⁶

Likewise, in the *DBS Order*, the Commission affirmed its commitment to defining product markets carefully and to ensuring competition within those markets. In analyzing EchoStar's and DirecTV's proposed merger, the Commission defined the relevant market as cable and satellite multichannel video programming services (thereby excluding terrestrial broadcast television), while noting that "services provided by DirecTV and EchoStar are significantly closer substitutes than those offered by cable systems."¹⁷ The Commission left open the possibility that the relevant market might include only DBS providers rather than cable providers as well, and indicated that the administrative law judge hearing the case would have to determine whether the DBS providers competed only with one another, with each other and high-capacity

¹⁴ *SDARS Order*, 12 FCC Rcd at 5786, ¶ 78.

¹⁵ *Id.*

¹⁶ *See Annual Report and Analysis of Competitive Market Conditions with Respect to Domestic and International Satellite Communications Services*, First Report, 22 FCC Rcd 5954, 5973, ¶ 55 (2007) (defining SDARS as "satellite audio programming provided to persons within the United States for a fee").

¹⁷ *DBS Order*, 17 FCC Rcd at 20624, ¶ 169.

cable providers, or with each other and all cable providers.¹⁸ Even with cable systems included in the market, the Commission rejected the proposed merger of EchoStar and DirecTV as anti-competitive:

[T]he record indicates that substantial potential public interest harms may result from the transaction ... The record before us irrefutably demonstrates that the proposed transaction would eliminate a current viable competitor from every market in the country ... Perhaps most significantly, each [company] holds licenses for approximately half the total orbit slots that allow broadcast to the entire continental United States – licenses they seek in this proceeding to transfer to a single new entity ... [C]ase law under the antitrust laws is generally quite hostile to proposed mergers that would have these impacts on the competitive structure, because such mergers are likely to increase the incentive and ability to engage in anticompetitive conduct...¹⁹

The merger to monopoly proposed in the instant proceeding obviously raises anti-competitive concerns on a par with those voiced by the Commission in the *DBS Order*. Here, just as in the DBS proceeding: "The Applicants have cited no example where [the Commission has] permitted a single commercial spectrum licensee to hold the entire available spectrum allocated to a particular service."²⁰ To secure approval of such an unprecedented merger, Sirius and XM would have to demonstrate that unprecedented conditions have so changed the audio entertainment market that the traditional product market definitions and antitrust analyses relied upon by the Commission and DOJ are no longer valid. As discussed below, the Applicants fail to provide such a rigorous showing.

2. Other Audio Media are Complements to, not Substitutes, for SDARS

Obviously, competition exists among various forms of audio entertainment media. Sirius and XM, however, treat the existence of such competition as proof that their proposed merger

¹⁸ See *Applications of EchoStar Communications Corporation and Hughes Electronics Corporation*, FCC Hearing Designation Order, 17 FCC Rcd 20559 (October 9, 2002).

¹⁹ *Id.* at 20661, ¶ 275.

²⁰ *Id.* at 20662, ¶ 277.

will not contravene the public interest, citing descriptions of a competitive marketplace from the National Association of Broadcasters ("NAB") and Clear Channel Communications ("Clear Channel") as evidence that "economic forces will be more than sufficient to ensure that the proposed merger will have no anti-competitive effects in the market for audio entertainment services."²¹ Such jabs at the broadcast industry hardly qualify as the empirical proof necessary to justify the first merger of its kind in Commission history.

Sirius and XM do not even focus on the relevant inquiry, namely whether alternative audio services, such as terrestrial radio, are adequate substitutes for SDARS under the Commission's and DOJ's antitrust standards. Again, under these standards, other audio services must not only compete with satellite radio, but must be interchangeable enough with SDARS that it would prove unprofitable for a combined Sirius/XM entity to raise prices above competitive levels, as consumers would abandon satellite radio in favor of substitute services.²² The Applicants emphasize satellite radio's "3.4 percent of all radio listening" without bothering to acknowledge that "all radio listening" hardly tracks the acceptable antitrust market definition.²³ Nor do the Applicants undertake the necessary tasks of providing empirical evidence of substitutability for services they claim satisfy the Commission's and DOJ's understanding of product substitutes, or of distinguishing such services from those that may overlap SDARS with respect to certain features but nonetheless fall short of serving as SDARS

²¹ Consolidated Application at 21 (quoting *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* ("Broadcast Ownership Proceeding"), Reply Comments of NAB, MB Docket No. 06-121, at 34 (filed Jan. 16, 2007); *Broadcast Ownership Proceeding*, Comments of Clear Channel, MB Docket No. 06-121, at 10 (filed Oct. 23, 2006)).

²² See Merger Guidelines at ¶¶ 1.11-1.12, *supra* n. 13.

²³ *Id.* at 22.

substitutes.²⁴ The burden of proof in this proceeding rests squarely on Applicants' shoulders; their inability or unwillingness to provide this empirical data constitutes sufficient grounds for denying the Consolidated Application.

The evidence on the record in this proceeding indicates that alternative audio services are not adequate substitutes for SDARS and that, despite Applicants' claims, SDARS continues to exist as a unique product market. Merger Guidelines at ¶¶ 1.11-1.12. Significantly, churn rates – paid subscribers terminating their subscriptions – are low for both XM and Sirius, evidencing the relative insensitivity of satellite radio subscribers to competition from alternative audio services as well as from internal changes in satellite radio services, including price increases. As noted by the American Antitrust Institute ("AAI"), in April 2005, XM raised its subscription price by 30%, from \$9.99 to \$12.99, thereby matching Sirius's price.²⁵ In the second and third quarters of 2005, the period immediately following this price increase, XM's churn rate did not increase, and increased only slightly thereafter.²⁶ Mel Karmazin, the CEO of Sirius, is on record explaining how Sirius's low churn rate indicates the elasticity in satellite radio pricing. In response to a recent inquiry concerning Sirius's consideration of higher pricing, Karmazin stated as follows:

Yeah. I mean we're open. One of the things about the company is that people are satisfied with the product, would recommend it to a friend. We have a price point of \$12.95. We believe that there is elasticity in our price point. We think we offer a great value under fifty cents a day. Our churn rate reflects the fact that consumers are happy with it. We see what's happening in Canada, where we have

²⁴ See, e.g., *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997) (designating consumable office supplies sold through office supply superstores a distinct product market despite fact that such supplies also available at other outlets).

²⁵ See *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. Consolidated Application for Transfer of Control*, MB Docket No. 07-57, Comments of AAI (filed June 5, 2007) ("AAI Comments") at 19.

²⁶ See *id.* at 20.

a significant lead in satellite radio and we are priced at a higher point. So, we have no announcement to make on anything regarding any price increases, but we think that's an option that the company has, that it's a good option for us.²⁷

Sirius's and XM's low churn rates and the relative elasticity of satellite radio pricing suggest a corresponding inelasticity of demand between SDARS and other audio services. In other words, satellite radio is not constrained by competing audio services – other than competing SDARS providers – in setting prices, as satellite radio subscribers are unlikely to migrate to other audio services in the face of rising satellite radio fees.

The vastly different cost structures of various audio services confirm that they are not true substitutes for SDARS and do not have a sufficient disciplining effect on Sirius's and XM's competitive behavior. A basic service subscription at Sirius and XM currently runs \$12.95 a month. By way of comparison, terrestrial radio is free, while audio formats such as iPods and mobile phones impose incremental content charges (charges that would amount to significantly more than \$12.95 a month for an audio library comparable to that provided by satellite radio). These pricing differences suggest that satellite radio and other forms of audio service do not belong in the same product market.²⁸

The data discussed above all indicate that alternative audio services are complements to, rather than substitutes for, SDARS. Significantly, Sirius and XM have failed to offer any

²⁷ See *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. Consolidated Application for Transfer of Control*, MB Docket No. 07-57, NAB Letter attaching *Analysis of Antitrust Concerns Regarding XM/Sirius Merger* prepared by Crowell & Moring ("Crowell Memo") at 4 (filed May 22, 2007) (quoting Mel Karmazin, CEO of Sirius, Citigroup 17th Annual Media & Telecommunications Conf. (Jan. 10, 2007) (webcast available at <http://investor.sirius.com/medialist.cfm>)).

²⁸ See Crowell Memo at 5 (citing *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1163 (9th Cir. 1984) (noting 300 percent price difference between home-recorded and pre-recorded tapes supports government assertion that the two should not be included in same product market)).

empirical data to the contrary. The following review of the alternative media cited by Applicants confirms that SDARS comprises its own distinct product market.

a. Terrestrial Radio

Satellite radio constitutes a premium audio service vis-à-vis terrestrial radio, and is aggressively marketed as such by both Sirius and XM. For example, in its marketing materials, Sirius distinguishes its satellite radio service from "regular radio" on a number of bases, including "100% commercial-free music," "a breadth and depth of programming basically unavailable on regular radio," and "hundreds of exclusive live interviews and performances you won't hear anywhere else..."²⁹ As AAI points out, XM has used similar terms in describing what distinguishes satellite radio from regular radio:

[A]n "endless variety" of programming, much of which is not available on terrestrial radio, including dozens of commercial-free music channels, musical formats unavailable in many radio markets, niche programming made possible by aggregating demand, comprehensive sports coverage, including a vast array of out-of market games, "adult" programming, coast-to-coast listening or portability, and CD-quality sound.³⁰

According to AAI, as compared to satellite radio, "[t]errestrial radio, the most realistic competitor, offers far fewer channels, less diverse content, no commercial-free music, poorer sound quality, and is not geographically continuous."³¹

These substantive differences in service clearly indicate that satellite radio and terrestrial radio are complementary rather than substitutive forms of audio media. Available market research supports this conclusion. As Sirius's Karmazin notes, "satellite radio subscribers are

²⁹ Crowell Memo at 5 (quoting Sirius Website, FAQs, About Sirius, <http://www.sirius.com/servlet/ContentServer?pagename=Sirius/CachedPage&c=Page&cid=1018209032792>).

³⁰ AAI Comments at 22 (citing XM 2006 10-K at 1, 36).

³¹ *Id.* at 22-23 (internal citations omitted).

heavy listeners to radio in general, and spend even more time listening to AM/FM radio than they do satellite programming."³² As this data indicates, satellite radio listeners use satellite radio and terrestrial radio in complementary fashion, tuning in to each respective service for differing purposes. Such listeners have not balked at satellite radio's fees to date, and thus are unlikely to abandon satellite radio for terrestrial radio in the event of price increases from SDARS providers.³³ This evidence clearly contradicts the Applicants' unsupported claims that terrestrial radio poses a sufficient competitive threat to satellite radio to safely permit creation of a single SDARS provider.

b. Other Alternative Audio Media

Applicants round out there description of the competitive audio market place by designating HD radio, Internet radio, iPods, MP3 players, mobile phones and CD players as meaningful competitors to SDARS providers. A basic familiarity with these services and a little common sense suggest that, like terrestrial radio, these are complements rather than substitutes for SDARS, and Applicants offer no hard evidence to the contrary.

With respect to HD Radio, AAI summarizes its differences with satellite radio as follows:

HD Radio, which is just emerging, has high sound quality and will boost the number of available stations in many markets, but still offers far less variety than satellite radio, no marquee content, little commercial-free music, is not continuous, and has had limited success in getting HD radios into automobiles.³⁴

AAI similarly concludes that Internet radio and audio via mobile phones represent poor

³² Crowell Memo at 6 (quoting Regarding the Digital Future of the United States: The Future of Radio, House Energy and Commerce Committee, Subcommittee on Telecommunications and the Internet (March 7, 2007) (statement of Mel Karmazin, CEO of Sirius) ("Karmazin March 7, 2007 Congressional Testimony").

³³ See AAI Comments at 17, n 51 (noting that Arbitron data suggests cross elasticity of demand between satellite radio and terrestrial radio is not high, as satellite radio listeners have not abandoned terrestrial radio but in fact listen to terrestrial radio more than satellite radio).

³⁴ *Id.* at 23 (internal citations omitted).

substitutes for SDARS: "while [these services] appear to offer potential for subscription-based services comparable in many respects to those offered by the Applicants, it is not clear when or if that potential will be reached, and there is no evidence to suggest that any such service is likely to be a full fledged competitor to XM or Sirius in the next few years."³⁵ Moreover, these speculative services are generally offered to a different consumer base via different technologies for different purposes than satellite radio, and the mere fact of certain overlaps (e.g., Sirius and XM subscribers have the option of listening to satellite radio via the Internet) hardly makes these services viable substitutes for SDARS.³⁶

As for iPods, MP3 players and CD players, these audio services are essentially playback devices – sleeker than, and superior to, older playback models (such as cassette recorders), but not substantively different in nature. Playback devices, including CD players, were available in 1997 when the Commission established SDARS, and the Commission did not consider such devices substitutes for satellite radio. Applicants have provided no compelling reasons why playback devices should now be included in the same product market as SDARS.

In short, Applicants have failed to support their far-reaching claims that alternative audio services will sufficiently constrain the competitive behavior of a monopoly SDARS firm to safely permit the merger of Sirius and XM. The evidence on the record in this proceeding – including the marketing efforts of the Applicants, documented consumer behavior, the past market determinations of the Commission and current price differentials among these services – suggests that terrestrial radio and the other audio services cited by Applicants are complements to rather than substitutes for SDARS. As such, these services are incapable of having a sufficient

³⁵ *Id.* at 24

³⁶ *See* Crowell Memo at 2.

disciplining effect on any anti-competitive excesses attending a Sirius/XM merger, including price increases or diminished quality of service. Despite Applicants claims, SDARS clearly constitutes its own product market. The merger to monopoly proposed by Applicants thus violates fundamental antitrust principles and is contrary to the public interest.

B. Competitive Harms to Terrestrial Radio

The fact that SDARS comprises its own product market does not mean traditional radio broadcasters such as Entravision would be immune from serious competitive harm at the hands of a monopoly SDARS provider. To the contrary, the concentration of market power in a combined Sirius/XM firm would surely lead to anti-competitive, monopolistic behavior with negative consequences for terrestrial radio and consumers alike.

As NAB has pointed out, a monopoly SDARS provider would use its monopoly profits from subscription revenue "to bolster the satellite radio advance toward advertising revenue from national, regional and local sources."³⁷ Sirius and XM have indicated as much. According to Sirius's Karmazin, based on the combination of Sirius's and XM's subscribers, "the merged company will be significantly more attractive to large national advertisers."³⁸ Relying on cross-subsidization from its monopoly profits, Sirius/XM could readily engage in predatory pricing in advertising markets.³⁹

A combined Sirius/XM firm could also use its monopoly power to negotiate exclusive deals with content providers, thereby denying broadcasters access to popular sports and

³⁷ *XM Satellite Radio Holdings Inc. and Sirius Satellite Radio Inc. Consolidated Application for Transfer of Control*, MB Docket No. 07-57, NAB Letter attaching *FCC-Related Concerns Raised by XM Radio/Sirius Merger* prepared by Wilkinson Barker Knauer, LLP ("Wilkinson Memo") at 2 (filed March 22, 2007).

³⁸ AAI Comments at 29 (quoting *Sirius Satellite Radio & XM Satellite Radio to Combine in Merger of Equals*, FD (Fair Disclosure) Wire, Feb. 20, 1997 (Karmazin)).

³⁹ See NAB Letter/Wilkinson Memo at 2.

entertainment programming now exclusively available on terrestrial radio and forcing listeners to subscribe to satellite radio to hear these programs.⁴⁰ Finally, a SDARS monopoly could attract investment away from terrestrial radio, further hindering broadcasters' ability to compete effectively with satellite radio.⁴¹

As noted by NAB, "such unfair competition will harm local radio stations, but more importantly, it will harm the public by eroding the valuable, advertiser-supported programming and services provided by local stations."⁴² It does not require a broadcast-minded party such as the NAB to recognize that the harms to terrestrial radio identified above will have a negative impact on the welfare of consumers. The anti-competitive harms to broadcast radio and its listeners posed by a SDARS monopoly demonstrate that the proposed merger of Sirius and XM is contrary to the public interest.

III. REVIEW OF PURPORTED BENEFITS

Sirius and XM claim a number of benefits will accompany the creation of SDARS monopoly, such as à la carte programming choices at lower prices, more diverse programming, accelerated technologies (including Commission-mandated, long-delayed interoperable receivers) and various operational efficiencies based on the elimination of redundancies upon merger of the two existing SDARS providers.⁴³ Before examining Applicants' particular claims, Entravision wishes to note that the benefits of the proposed merger would have to be substantial to outweigh the significant competitive harms identified above. As the Commission stated in the DBS merger proceeding:

⁴⁰ See *id.* at 3.

⁴¹ See AAI Comments at 29.

⁴² NAB Letter/Wilkinson Memo at 2-3.

⁴³ See Consolidated Application at 9-20.

[Where] a merger is likely to result in a significant reduction in the number of competitors and a substantial increase in concentration, antitrust authorities generally require the parties to demonstrate that there exist countervailing, extraordinarily large, cognizable, and non-speculative efficiencies that are likely to result from the merger.⁴⁴

Even if Sirius and XM could demonstrate that bona fide benefits would in fact arise from the proposed transaction, it is doubtful such benefits would qualify as "extraordinarily large," as required by this rigorous standard, a standard that clearly applies to the instant proposed merger to monopoly. As it stands, the benefits touted by Sirius and XM are non-cognizable and speculative under relevant antitrust standards.

The vast majority of the benefits claimed by Applicants are not merger-specific and are thus not includable in the cost-benefit analysis of the proposed merger. According to DOJ's Merger Guidelines, antitrust authorities should take into consideration only "merger-specific" benefits that are "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."⁴⁵ As noted by NAB, the Applicants' list of benefits are decidedly non-merger-specific, as "all of the alleged benefits would be more likely to occur without the merger in an environment of continued competition."⁴⁶

With respect to à la carte programming, Applicants fail to explain why unbundled programming choices at lower prices would be readily available under a merged entity but lie beyond the reach of individual SDARS providers. As for program diversity, surely continued competition better serves this goal than a SDARS monopoly. As recognized by AAI, to date Sirius and XM have "competed fiercely to offer differentiated, exclusive, and original

⁴⁴ *DBS Order*, 17 FCC Rcd at 20604, ¶ 100.

⁴⁵ Merger Guidelines at ¶ 4.0.

⁴⁶ NAB Letter/Wilkinson Memo at 1.

programming."⁴⁷ And diversity is not simply a matter of programs and channels, but also of viewpoint. A combined Sirius/XM entity means that content providers wishing to gain access to SDARS' national platform will be confined to a single, monopolistic gatekeeper rather than two competing service providers.⁴⁸

The Applicants' decision to include the deployment of interoperable receivers in their list of merger-specific benefits is, to say the least, a clever spin on their mutual disregard of the Commission's now decade-old mandate to provide such receivers to consumers. In the *SDARS Order*, the Commission instructed SDARS licensees to "design a receiver which would accommodate all satellite DARS providers," noting that:

By promoting receiver inter-operability for satellite DARS, we are encouraging consumer investment in satellite DARS equipment and creating the economies of scale necessary to make satellite DARS receiving equipment affordable. This rule also will promote competition by reducing transaction costs and enhancing consumers' ability to switch between competing DARS providers.⁴⁹

The Applicants claim that they are unable to subsidize interoperable receivers "because of uncertainty whether the subsidy would be recouped since the buyer might not subscribe to the company's service."⁵⁰ The proposed merger would presumably solve the problem by removing any uncertainty over the identity of the company to which the buyer would subscribe. With all due respect to Applicants, surely there are solutions less drastic than merger to achieve deployment of the already-mandated interoperable receivers.

Finally, with respect to operating efficiencies created by the elimination of redundancies in a merged firm, Entravision notes that Applicants have indicated that a combined SDARS

⁴⁷ AAI Comments at 13.

⁴⁸ See AAI Comments at 14-15.

⁴⁹ *SDARS Order*, 12 FCC Rcd at 5796, ¶ 103. See also 47 C.F.R. § 25.144(a)(3)(ii).

⁵⁰ Consolidated Application at 16.

entity would (optimistically) be operational on a single platform by 2017 or 2018.⁵¹ This timeframe clearly places the Applicants' claimed operational efficiencies outside the scope of this proceeding. By way of comparison, the Commission dismissed as "inherently speculative" EchoStar's and DirecTV's intention to consolidate their systems using a single set-top box within three years of their proposed merger.⁵²

In sum, the purported benefits of a combined Sirius/XM operation are non-merger specific, non-cognizable and speculative, and fall far short of the "extraordinarily large" benefits required to outweigh the significant anti-competitive effects of the Applicants' proposed merger to monopoly.

IV. PRICE CONTROLS ARE AN INADEQUATE AND UNDESIRABLE REMEDY

Applicants have indicated their willingness to accept a temporary freeze on subscription rates as a condition for allowing the proposed merger to proceed. The Commission should reject such a proposal as unworkable, given the compliance records of both Sirius and XM, and as undesirable pursuant to the pro-competitive policies informing contemporary Commission regulations and antitrust law.

The Commission has previously recognized the tendency of successfully merged companies to disregard post-merger promises made prior to merger approval.⁵³ In the instant matter, in addition to their failure to comply with the Commission's interoperable receiver-mandate, Sirius and XM both have violated Commission Rules designed to ensure that their

⁵¹ Karmazin March 7, 2007 Congressional Testimony, *supra*.

⁵² *DBS Order*, 17 FCC Rcd at 20634, ¶ 202.

⁵³ *See id.* at 20664, ¶ 284 (noting that post-merger "Applicants' incentives to carry through on their promises of enhanced competition will be decreased rather than increased).

receivers do not cause interference to broadcast radio stations,⁵⁴ as well as Rules concerning special temporary authority to use terrestrial repeaters and become *de facto* terrestrial radio stations providing such prohibited services as local weather and traffic reports.⁵⁵ Sirius and XM have made a habit of disregarding Commission policies they find too constraining – permitting the Applicants to merge would only exacerbate this problem.

More importantly, price regulations are counter to the Commission's pro-competitive regulation of communications services and the structural remedies preferred in antitrust law. According to DOJ, "[s]tructural remedies are preferred to conduct remedies [such as price regulation] in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market," and, further, "the use of conduct remedies standing alone to resolve a merger's competitive concerns is rare..."⁵⁶

The Commission expressed its own preference for facilities-based competition over regulation in the context of the proposed DBS merger:

In essence, what Applicants propose is that we approve the replacement of viable facilities-based competition with regulation. This can hardly be said to be consistent with either the Communications Act or with contemporary regulatory policy and goals, all of which aim at replacing, wherever possible, the regulatory safeguards needed to ensure consumer welfare in communications markets served by a single provider, with free market competition, and particularly with *facilities-based* competition. Simply stated, the Applicants' proposed remedy is the antithesis of the 1996 Act's "pro-competitive, deregulatory" policy direction.⁵⁷

The Commission's incisive description of the proposed DBS merger applies with equal force to the proposed merger of Sirius and XM. Competition, not monopoly, is the best means of

⁵⁴ See Wilkinson Memo at 8 (citing 47 C.F.R. Part 15).

⁵⁵ See *id.* at 8-9.

⁵⁶ DOJ Antitrust Division Policy Guide to Merger Remedies, at 20 (Oct. 2004) ("Merger Remedies Guide").

⁵⁷ *DBS Order*, 17 FCC Rcd at 20663, ¶ 282.

ensuring consumer welfare in the SDARS market. The transfer of control proposed in the Consolidated Application is contrary to the public interest and should therefore be denied.

V. **CONDITIONS TO ANY GRANT OF APPLICANTS' APPLICATION.**

While Entravision fully expects the Commission to deny the instant application, Entravision understands that such a result is not a certainty and the possibility exists that the application could receive Commission consent. Should the Commission find that the application is entitled to its consent, Entravision requests that any such consent contain certain conditions that protect competition between terrestrial radio and SDARS and enable listeners, who no longer have the chance to vote with their feet by moving from one carrier to another, to continue to have robust service from the merged entity. These conditions are as follows:

First, the Applicants should not be entitled to be the sole SDARS licensees going forward. They should be required to relinquish, after a reasonable period of time, which we suggest as no more than five years, one of their two licenses. At that time, the relinquished license should be placed in auction so that the Applicants will have a true competitor. In order to deal with the inevitable argument from the Applicants that their customers should not have to acquire a new receiver, Entravision submits that the Commission should enforce the interoperability requirement and require that Applicants provide an interoperable receiver, at no charge, to any customer seeking one.

Second, the Applicants should be required, in order to effectuate any merger, to relinquish their terrestrial services and no longer provide, on a terrestrial-only basis, local programming in the form of news, weather, or traffic reports. If the Applicants want to be local broadcasters they have the option of using their national channels. Alternatively, we suggest that the Commission adopt, as it has with DBS, a local-into-local provision so that if the Applicants

are engaging in local services, that terrestrial broadcasters can then demand that their signals are carried by the merged entity. However, Applicants should not be both their own local and national services using terrestrial services not intended for local programming purposes.

Third, the Commission should require that the Applicants provide a variety of program services and not use the merger to reduce the broad spectrum of services now available. The Applicants have indicated to financial analysts that the merger is an opportunity to reduce programming redundancies. In order to ensure that SDARS remains a platform with a robust variety of programming, including, for example, Spanish-language and religious programming, Entravision urges the Commission to allow customers to file complaints with it where services are eliminated and for the Commission to order the restoration of services upon a such a showing.

Fourth, the Commission should, until there is a competitive SDARS service available, require that the Applicants make available channels for lease by third parties, just as cable operators are required to do.⁵⁸ This would permit terrestrial broadcasters and other parties to lease space on the Applicants' service and provide programming to the public. This leasing opportunity would offer those who feel that satellite service is the preferred programming platform an opportunity to make use of it.

CONCLUSION

Sirius and XM have failed to demonstrate that conditions in the audio entertainment market justify the formation of a SDARS monopoly. The evidence on the record in this proceeding indicates that terrestrial radio and other alternative audio services are complements to rather than substitutes for satellite radio. As such, SDARS comprises a distinct product market,

58 See Sections 76.970 -- 76.975 of the Commission's Rules.

and Applicants have not submitted any empirical evidence to the contrary. A Sirius/XM monopoly would engage in anti-competitive behavior with negative consequences for consumers and terrestrial radio alike.

The purported benefits of the proposed transaction are non-merger-specific, non-cognizable and speculative. Further, the merger benefits touted by Sirius and XM do not begin to outweigh the serious competitive harms that would arise in connection with a SDARS monopoly. Finally, price regulation is an inadequate and undesirable remedy for these competitive harms. Competition, not monopoly, is the best means of ensuring that satellite radio service provides optimal benefits and minimal costs to consumers. For these reasons, the Consolidated Application is contrary to the public interest and should be denied.

Respectfully submitted,

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July 9, 2007

**Federal Communications Commission**

The FCC Acknowledges Receipt of Comments From ...
Entravision Holdings, LLC
...and Thank You for Your Comments

Your Confirmation Number is: '200779913178 '

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